Felix-Corona v. Mukasey, No. 06-71548

IKUTA, Circuit Judge, dissenting in part:

The majority construes *Otarola v. INS*, 270 F.3d 1272 (9th Cir. 2001), to stand for the proposition that "IIRIRA's stop-time rule does not apply to an alien who had his merits hearing on his application for suspension of deportation before an IJ prior to IIRIRA's effective date, even though the BIA reviewed his case after IIRIRA went into effect." Maj. op. at 2; *see also Alcaraz v. INS*, 384 F.3d 1150, 1153 n.1 (9th Cir. 2004). Such an interpretation is inconsistent with *Otarola* itself, in which we stated that "[i]n general, the BIA is bound to apply current law," and "that the BIA [is] required to apply the law existing at the time of its review, even if different from the law applied by the IJ." 270 F.3d at 1275 (internal quotation marks omitted) (second alteration in original).

"IIRIRA section 309(c)(5)(A) generally applies the stop-time rule to transitional rule aliens," like Felix-Corona, "whose deportations were initiated with the service of an [Order to Show Cause] and who seek suspension of deportation." *Ram v. INS*, 243 F.3d 510, 516 (9th Cir. 2001). *Otarola* created an "exception to the general rule" for the situation in that case, where "the INS delay[ed] proceedings by filing and maintaining meritless appeals in the face of clear statutory language and circuit precedent to the contrary in order to take advantage of a change in the immigration laws that becomes available solely by virtue of the

time delay resulting from the meritless appeal." *See* 270 F.3d at 1275–76. Because no such situation is present in this case, I dissent from the majority's conclusion that this case is "within the ambit of *Otarola*." Maj. op. at 3. Accordingly, I would affirm the BIA's decision in accordance with *Ram*, 243 F.3d at 516.